

X. APPLICABLE STATUTE AND COURT RULES

MASSACHUSETTS GENERAL LAWS CHAPTER 211D COMMITTEE FOR PUBLIC COUNSEL SERVICES

211D:1. Committee Membership; Terms; Filling Vacancies; Reimbursement; Conflicts of Interest.

Section 1. There shall be a committee for public counsel services, hereinafter referred to as the committee, to plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services by all salaried public counsel, bar advocate and other assigned counsel programs, and private attorneys serving on a per case basis. The committee shall consist of fifteen persons to be appointed for a term of three years by the justices of the supreme judicial court. Said court shall request and give appropriate consideration to nominees for the fifteen positions from the Massachusetts Bar Association, county bar associations, the Boston Bar Association, and other appropriate bar groups including, but not limited to, the Massachusetts Black Lawyers' Association, Women's Bar Association, and the Massachusetts Association of Women Lawyers. Each member of the committee shall serve until his successor in office has been appointed and qualified. Vacancies shall be filled by the justices of the supreme judicial court by appointment to an unexpired term. Members of the committee may be removed by the justices of the supreme judicial court. No member of the committee shall receive any compensation for his services, but each member shall be reimbursed for actual expenses incurred in attending the committee meetings.

The provisions of chapter two hundred and sixty-eight A shall apply to all members, officers and employees of the committee, except that the committee may provide representation or enter into a contract pursuant to the provisions of sections three or six although a member of the committee may have an interest or involvement in any such matter; provided, however, that such interest and involvement is disclosed in advance to the other members of the committee and recorded in the minutes of the committee; and provided, further, that no member having an interest or involvement in any contract under section three may participate in any particular matter, as defined in section one of chapter two hundred and sixty-eight A, relating to such contract.

211D:2. Establishment of Standards and Definition of "Indigency."

Section 2. The committee for public counsel shall establish a definition of "indigency" for the purposes of this chapter and uniform standards and procedures for the determination by the courts of the commonwealth that (1) a person is indigent and is unable to obtain counsel or (2) said indigent person has the ability to pay a reduced fee for the appointment of counsel. Said definition and standards, and any amendments thereto, shall be subject to the approval of the supreme judicial court and shall be used by the courts of the commonwealth in determining assignment of cases to the committee pursuant to section five. In the formulation of said definition, standards, and procedures, the committee shall consider the reporting system operated

by the commissioner of revenue for the purpose of verifying financial eligibility of participants in state or federally funded programs, and its potential applicability to the provision of legal services for indigent defendants. Payment of any reduced fee by an indigent person for the appointment of counsel shall be made to the probation department of the appointing court, and shall be forwarded to the state treasurer who shall deposit such in the general fund.

211D: 2A. Appointed Counsel Unnecessary if Incarceration not Part of Sentence; Assessment of Legal Counsel Fee.

Section 2A. Notwithstanding any other provision of law, a criminal defendant charged with a misdemeanor or a violation of municipal ordinance or bylaw need not be appointed counsel if the judge, at arraignment, informs such defendant on the record that, if the defendant is convicted of such offense, his sentence will not include any period of incarceration. For good cause, that judge or another judge of the same court may later revoke such determination on the record and appoint counsel, and on the request such counsel shall be entitled to a continuance to conduct any necessary discovery and to prepare adequately for trial. Any such determination or revocation by a judge shall be endorsed upon the docket of the case.

Any person provided counsel under the provisions of this chapter shall be assessed a legal counsel fee of one hundred dollars which may be waived at the discretion of the court. Said fee shall be in addition to any reduced fee required pursuant to section two and shall be collected in accordance with said section.

The department of revenue shall be authorized to intercept said fee from tax refunds due to persons who have not paid said fee.

The department of public welfare shall be authorized to deduct said fee in weekly or monthly increments from persons who have not paid said fee.

211D:3. Gifts and Grants or Contributions to Committee.

Section 3. Said committee may accept gifts, grants or contributions from any source, whether public or private, and may enter into contracts to provide or receive services with any federal, state, county or municipal entity, with any group or individual, whether profit or nonprofit, or with any nonprofit or voluntary charitable group, corporation, association or organization, including any bar association or bar advocate group.

211D:4. Rules and Regulations; Annual Report; Training of Counsel; Rotating Appointments.

Section 4. Said committee shall adopt such rules and regulations as may be necessary for the conduct of its affairs and may from time to time amend or revise the same. The committee shall prepare an annual report which shall be a public document. The committee shall establish standards and guidelines for the training, qualification and removal of counsel in the public and private counsel divisions who accept its appointments, and shall provide pre-service and in-service training for both private counsel who accept assignments and salaried public counsel.

The committee may establish a rotating appointment mechanism that will encourage open access among attorneys participating within the private counsel division.

211D:5. Appointment or Assignment of Counsel.

Section 5. Said committee shall establish, supervise and maintain a system for the appointment or assignment of counsel at any stage of a proceeding, either criminal or noncriminal in nature, provided, however, that the laws of the commonwealth or the rules of the supreme judicial court require that a person in such proceeding be represented by counsel; and, provided further, that such person is unable to obtain counsel by reason of his indigency. The committee may also establish a system for the provision of counsel in any pre-arraignment procedure. A justice or associate justice shall assign a case to the committee, as hereinafter provided, after receiving from the probation officer a written report containing the probation officer's opinion as to the defendant's ability to pay for counsel, based on the standards and procedures provided for in section two.

211D:6. Use of Public Defender Division; Private Counsel Division.

Section 6. In carrying out its duties as prescribed in section five, the committee shall:

- (a) Utilize its staff of attorneys, which shall be known hereafter as the "public defender division". Said division shall include a unit to be known as the Roxbury defenders unit, which shall represent clients as assigned pursuant to this chapter in the Roxbury division of the district court department. Said division shall also include a unit to be known as the youth advocacy project. Said division shall be assigned to represent indigent defendants in all criminal cases, except that:
 - (i) said division shall not be assigned to represent more than one defendant in any matter before any court on the same case or arising out of the same incident;
 - (ii) said division shall not be assigned to represent a defendant in any case in which there is a conflict of interest with any of its clients;
 - (iii) said division shall not be assigned to a case where a person is before the probate and family court department or the housing court department for criminal contempt or in such other proceeding in said departments in which such person is entitled to be represented by counsel;
 - (iv) said division shall not be assigned to represent any child alleged to be delinquent, except in such cases which may result in exposure to adult incarceration or commitment to the department of youth services until the age of twenty-one, and except in cases charging delinquency by conduct which would be punishable by imprisonment in the state prison if committed by an adult and except in the Boston and Bristol county divisions of the juvenile court department or in the Roxbury division of the district court department. Private counsel who have been certified to accept assignments in such cases shall also be eligible to provide representation to persons thus charged;
 - (v) said division shall not be assigned to represent any person charged with a misdemeanor unless said misdemeanor is in conjunction with a felony charge for which said division has been assigned.

- (b) Establish, supervise, and maintain a system for the appointment of private counsel, hereafter called the "private counsel division", which shall include a children and family law program and a mental health unit. The committee shall enter into contractual agreements with any state, county or local bar association or voluntary charitable group, corporation or association, including bar advocate groups, for the purpose of providing such counsel. Said committee may also contract with such other organized groups of attorneys as may be formed to afford representation to indigent defendants and may appoint and compensate private attorneys, on a case-by-case basis, as counsel for indigents entitled to representation. Neither individuals nor members nor participants in any group, corporation or association with whom the committee may contract under this paragraph shall be considered to be or have any rights as state employees.
- (i) Said division shall be assigned for all persons accused of crimes entitled to counsel who, through their inability to pay for counsel, must have counsel appointed to them, but who, pursuant to the provisions of subparagraph (a) of this section are not to be represented by the public counsel division.
 - (ii) Said division shall be assigned to represent a person who is before the probate and family court department or the housing court department in a criminal contempt proceeding or in such other proceeding in said departments in which a person is entitled to be represented by counsel.
 - (iii) Said division shall also be assigned to represent persons in such other proceedings as the chief counsel shall determine to be necessary.

211D:6A.

Section 6A. In carrying out its duties as prescribed in sections 5 and 6, the committee shall, subject to appropriation, utilize its attorney staff within the private counsel division. The committee shall establish a children and family law program in the counties of Essex and Hampden which shall, upon the court's appointment, provide representation to indigent persons in children and family law cases. Nothing herein shall be construed to limit the system as established in sections 5 and 6 of this chapter, whereby the court appoints certified private counsel to represent children and parents in the majority of children and family law cases.

211D:7. Representation of Persons Charged with Concurrent Felonies Under ALM GL c 218 ' 26.

Section 7. Said division shall be assigned to represent persons charged in the district court department with concurrent felonies under section twenty-six of chapter two hundred and eighteen as further defined by the committee.

211D:8. Representation of Persons Accused of Murder.

Section 8. Upon a determination by a court that a person accused of murder in the first or second degree is indigent, the chief counsel or his designee may assign the case to either the public defender division or the private counsel division, subject to the approval of the justice making the determination of indigency.

211D:9. Development of Standards.

Section 9. The committee shall establish standards for the public defender division and the private counsel division which shall include but not be limited to:

- (a) vertical or continuous representation at the pre-trial and trial stages by the attorney either assigned or appointed, whenever possible;
- (b) required participation by each attorney in an approved course of training in the fundamentals of criminal trial practice, unless the attorney has a level of ability which makes such participation unnecessary;
- (c) specified caseload limitation levels;
- (d) investigative services;
- (e) a method for the provision of social services or social service referrals;
- (i) availability of expert witnesses to participating counsel;
- (ii) clerical assistance, interview facilities, and the availability of a law library and model forms to participating counsel; and
- (iii) adequate supervision provided by experienced attorneys who shall be available to less experienced attorneys.
- (iv) qualifications for vendors for the services provided in clauses (d), (e), and (f) and a range of rates payable for said services, taking into consideration the rates, qualifications and history of performance; provided, however, that such ranges may be exceeded with approval of the court. Payment of such costs and fees shall be in accordance with the provisions of section twenty-seven A to G, inclusive, of chapter two hundred and sixty-one.

211D:10. Monitoring and Evaluating Counsel; Client Complaint Resolution; Comments by Justice on Counsel's Performance.

Section 10. The committee shall monitor and evaluate compliance with the standards and the performance of counsel in its divisions in order to insure competent representation of defendants in all courts of the commonwealth and shall establish a procedure for the review and disposition of client complaints. The committee shall also establish procedures whereby comments on the standard of performance of counsel in its divisions may be submitted by the justice hearing a particular matter.

211D:11. Establishment and Review of Compensation Rates.

Section 11. The committee shall establish rates of compensation payable, subject to appropriation, to all counsel who are appointed or assigned to represent indigents within the private counsel division in accordance with the provisions of paragraph (b) of section six. Such rates of compensation shall be reviewed periodically at public hearings held by the committee at appropriate locations throughout the state, and notice shall be given to all state, county and local bar associations and other interested groups, of such hearings by letter and publication in advance of such hearings. Such periodic review shall take place not less than once every two years.

211D:12. Compensation of Private Counsel; Remedy for Counsel Aggrieved by Amount of Compensation; Audit and Oversight Department; Delayed Submission of Counsel Bills.

Section 12. The committee shall establish policies and procedures to provide fair compensation to private counsel, which shall include a remedy for any attorney aggrieved by the amount of payment. The committee shall also establish an audit and oversight department to monitor billing and private attorney compensation. All invoices shall be processed for payment within thirty days of receipt by the chief counsel. Bills shall be submitted to the committee within thirty days of the conclusion of a case; or, if the case is pending at the end of the fiscal year, within thirty days after the end of such fiscal year. The amount of payment for invoices received by the chief counsel more than thirty days after the final disposition of the case or more than thirty days after the end of the fiscal year shall be reduced by five percent. Bills submitted after such date need not be processed for payment within thirty days. The committee may further prescribe such policies and procedures for payment as it deems appropriate; provided, however, that the committee may impose interest and penalties, where appropriate, upon overpayment of the private attorney bills recovered from private attorneys.

211D:13. Chief and Deputy Chief Counsel; Legal and Nonlegal Staff of Public Counsel Division.

Section 13. The committee shall appoint a chief counsel, whose responsibilities and duties shall be defined by the committee and shall include, but not be limited to, the overall supervision of the workings of the various divisions of the committee. The committee shall further appoint two deputy chief counsel, with duties defined by the committee, one of whom shall supervise the public defender division, and the other shall supervise the private counsel division. The committee shall also prescribe the procedures for the appointment of all legal and nonlegal staff of the public defender division and for the procurement of office space as may be required. The chief counsel shall authorize the certification of all payments under section twenty-seven G of chapter two hundred and sixty-one and section twenty of chapter twenty-nine. All legal and nonlegal staff of the public counsel division shall be full time and shall devote their entire time during ordinary business hours to their duties and shall neither directly or indirectly engage in the private practice of law. The chief counsel and deputy chief counsels shall likewise devote full time to their duties. The chief counsel, deputy chief counsels and all legal and non-legal staff of the committee, including staff attorneys hired under subparagraphs (a) and (b) of section 6 but not including persons described in the fourth sentence of said subparagraph (b) of said section 6, shall be considered public employees for purposes of chapter 258. The chief counsel shall be paid a salary comparable to the salary paid to a district attorney. The salaries of the deputy chief counsels shall be established by the committee. All other legal staff of the public defender division shall be paid at salaries comparable to the salary paid to an attorney employed in a district attorney's office.

The counsel and other employees appointed by the committee shall not be subject to the provisions of chapter thirty-one.

211D:14. Public Counsel Division to Represent Indigents in Appeals and Related Post-Conviction Proceedings; Conflicts of Interest.

Section 14. The public counsel division, except in cases of conflict of interest, shall represent indigent defendants in all appeals and related post-conviction remedies. In the case of a conflict of interest, the assignment shall be to the private counsel division.

211D:15. Consultation with Greater Roxbury Community Advisory Board.

Section 15. The committee shall consult regularly with a community advisory board appointed by the committee to represent the greater Roxbury community. Members of the community advisory board shall not receive compensation or reimbursement for expenses.

EXCERPTS FROM
SUPREME JUDICIAL COURT RULE 3:10

(Amended July 1, 1986)

(PROPOSED REVISIONS CURRENTLY UNDER CONSIDERATION BY THE SJC)

3:10 ASSIGNMENT OF COUNSEL
(Applicable to all courts)

Section 1. Advice as to Right to Counsel.

If any party to a proceeding in which the law of the Commonwealth or the rules of this court establish a right to be represented by counsel initially appears in any court without counsel, the judge shall advise the party, or if the party is a juvenile, the juvenile and a parent or legal guardian, where appropriate, that: (a) in this case the law requires that counsel be available, at public expense if necessary and (b) if the court finds that the party wants counsel and cannot afford his own counsel, then the Committee for Public Counsel Services will provide counsel at no cost or at a reduced cost. Thereafter, the judge shall make findings as provided in the following sections of this rule.

Section 2. Waiver of Counsel.

If the party knowingly elects to proceed without counsel, a written waiver by the party and a certificate of the judge on the form established in Section 9 of this rule shall be signed, respectively, by the party and the judge and filed with the papers in the case. If the party knowingly elects to proceed without counsel but refuses to sign the form established in Section 9 of this rule, the judge shall so certify on that form, which shall be filed with the papers in the case.

Section 3. Findings as to Right to Counsel.

If the judge finds that the party has not knowingly elected to proceed without counsel and the party does not arrange to obtain his own counsel, the judge shall receive a written report and opinion as to indigency from a probation officer or other appropriate court employee as provided in Section 6 of this rule. After reviewing the report and opinion and interrogating the party, as appropriate, the judge shall make one of the following three determinations:

- (a) the party is indigent, or
- (b) the party is indigent but able to contribute, or
- (c) the party is able to procure counsel.

In making such findings, the judge shall be guided by the definitions in Section 6 of this rule. The judge shall record his findings on the form provided in Section 6(c) which shall be filed with the papers in the case.

Section 4. Assignment of Counsel/Notice of Assignment.

If under Section 3 of this rule the judge finds that the party is in category (a) or (b), the judge shall assign the Committee for Public Counsel Services to provide representation for the party, unless exceptional circumstances, supported by written findings, necessitate another procedure, provided that such procedure is consistent with Chapter 211D of the General Laws and the rules of this court. The court clerk or register shall promptly complete and transmit a Notice of Assignment of Counsel Form, as provided by the Committee for Public Counsel Services with the approval of this court, to the party and file a copy with the papers in the case.

If under Section 3 of this rule the judge finds that the party is in category (c) but has not after a reasonable time either waived counsel or procured counsel, then the case may be ordered to proceed.

Section 5. Standby Counsel.

Notwithstanding a party's waiver of counsel, the judge may assign counsel in accordance with this rule to be available to assist the party in the course of the proceedings.

Section 6. Establishing Indigency.

(a) Definitions -

The following definitions shall be applied in connection with this rule:

- (i) Indigent - A person who, at any stage of a court proceeding, is:
 - (A) receiving one of the following types of public assistance: AFDC, GR, poverty related veterans' benefits, food stamps, refugee resettlement benefits, Medicaid, or SSI; or
 - (B) committed to a public mental health facility; or
 - (C) serving a sentence and in custody in a jail or correctional institution; or
 - (D) receiving an annual income, after taxes, one hundred twenty-five per cent or less of the current poverty threshold referred to in Section 27A(b) of Chapter 261 of the General Laws; or

- (E) unable to pay the anticipated cost of counsel for the matter(s) before the court because his available funds are insufficient to pay any amount for the retention of counsel
- (ii) Indigent But Able to Contribute - A person who, at any stage of a court proceeding, is unable to pay the anticipated cost of counsel for the matter(s) before the court because his available funds are less than the anticipated cost of counsel but sufficient for the person to pay a portion of that cost.
 - (iii) Anticipated Cost of Counsel - The cost of retaining private counsel for representation on the matter(s) before the court, as periodically estimated and published by the Committee for Public Counsel Services.
 - (iv) Available Funds - Liquid assets and disposable net monthly income calculated after provision is made for bail obligations. For the purpose of determining available funds, the following definitions shall apply:
 - (A) Liquid assets - cash, savings accounts, bank accounts, stocks, bonds, certificates of deposit, equity in real estate, and equity in motor vehicles. One motor vehicle necessary to maintain employment shall not be considered a liquid asset.
 - (B) Income - salary, wages, interest, dividends, and other earnings which are reportable for federal income tax purposes, and cash payments such as reimbursements received from pensions, annuities, social security and public assistance programs. It includes any contribution received from any family member and other person who is domiciled in the same residence as the defendant and who is helping to defray the family's basic living costs.
 - (C) Disposable net monthly income - the income remaining each month after deducting federal, state and local income taxes, social security taxes, contributory retirement, union dues, and basic living costs.
 - (D) Basic living costs - the average monthly amount spent by the party for reasonable payments towards living costs, such as shelter, food, utilities, health care, transportation, clothing, loan payments, support payments, and court-imposed obligations.
- (b) Report by Probation Officer or Other Appropriate Court Employee - The probation officer or other appropriate court employee shall provide to a judge a written report and opinion as to indigency on a form prescribed by this court* based on information obtained from the party and subject to a verification system established by the Chief Administrative Justice of the Trial Court. The form shall include information necessary to provide a basis for making a determination with respect to indigency as provided in this rule.

*The form prescribed by the Supreme Judicial Court is as follows.

- (c) Findings and Conclusions of Indigency Form - The following form shall be employed by the judge in making findings and conclusions as to entitlement to assigned counsel as required by Section 3 of this rule.

Section 7. Inadmissibility of Information Obtained From a Party in Connection with This Rule.

No information provided by a party pursuant to this rule may be used in any criminal or civil proceeding against him except in a prosecution for perjury or contempt committed while providing such information.

Section 8. Counsel for Parties Indigent and Indigent but Able to Contribute.

- (a) Appearance of Counsel. Counsel assigned by the Committee for Public Counsel Services to represent a party pursuant to this rule shall file an appearance in the case within forty-eight hours after notification of the assignment.
- (b) Withdrawal of Appearance. If counsel assigned by the Committee for Public Counsel Services, who has filed an appearance, is unable or unwilling to represent a party, he shall move to withdraw his appearance. If the court consents to the motion for withdrawal, the court shall immediately notify the Committee for Public Counsel Services to obtain a new assignment of counsel.
- (c) Payment of Counsel Costs.
 - (i) If a party is determined to be indigent, such party may not be ordered, required or solicited to make any payment of the cost of counsel.
 - (ii) If a party is determined to be indigent but able to contribute, the judge may order the party to pay a reasonable amount toward the cost of counsel. This payment shall be made to the probation officer or other appropriate court employee who shall cause the payment to be deposited with the State Treasurer in accordance with law.
 - (iii) If a party has been assigned counsel, at any time prior to the conclusion of the case, the judge, upon a determination that any assets which are the property of the party have become, or are about to become, available funds, may order that a re-examination of indigency take place in accordance with this rule.

Section 9. Waiver Form as to Counsel.

The following form shall be employed by the courts in recording the waiver and certification required in Section 2 of this rule.

Rule 33
COUNSEL FOR DEFENDANTS INDIGENT AND
INDIGENT BUT ABLE TO CONTRIBUTE
(Applicable to District Court and Superior Court)

The assignment of counsel for defendants determined to be indigent or indigent but able to contribute shall be governed by the provisions of G.L. c.211D and Supreme Judicial Court Rule 3:10.